Office-Supreme Court, U.S.
FILED
MAY 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2016

In the Supreme Court of the United States

October Term, 1980

JAMES P. FRACKELTON,
Petitioner,

vs.

GUS SWANSON, VIRGINIA SWANSON,
SHIA SHAPIRO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

DONALD M. ROBINER, *Counsel of Record*
PAUL F. LEVIN
SCHWARZWALD, ROBINER, WOLF & ROCK,
A Legal Professional Association
1700 Ohio Savings Plaza
1801 East Ninth Street
Cleveland, Ohio 44114
(216) 781-1700
Counsel for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTION PRESENTED FOR REVIEW

Whether the requirement under Ohio law, that an individual asserting a claim for malicious prosecution must allege and prove as an element of damage either arrest of his person or seizure of his property, constitutes a denial to that individual of due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Ohio are all of those parties listed in the caption of the case in this Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW I
PARTIES TO THE PROCEEDING I
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL PROVISION 2
STATEMENT OF THE CASE 2
FEDERAL QUESTIONS 5
REASONS FOR ALLOWANCE OF THE WRIT 6
CONCLUSION 15

APPENDIX:

Order of the Supreme Court of Ohio Overruling Motion to Certify Record (February 26, 1981) A1
Order of the Supreme Court of Ohio Dismissing the Appeal (February 26, 1981) A2
Journal Entry and Opinion of the Court of Appeals (October 16, 1980) A3
Judgment Entry of the Court of Common Pleas (April 5, 1979) A9
Judgment Entry of the Court of Common Pleas (March 26, 1979) A10

TABLE OF AUTHORITIES

Cases

Backus v. Fort Street Union Depot Company, 169 U.S. 557, 18 S. Ct. 445 11
Baker v. Carr, 369 U.S. 186 (1962) 15
Brown v. Board of Education, 347 U.S. 483 (1954) 15
Douglas v. California, 372 U.S. 353 (1963) 15

Griffin v. Illinois, 351 U.S. 12 (1956) 15
Ingram v. Richardson, 471 F.2d 1268 (1972) 13
In re Lifshutz, 2 Cal. 3d 415, 467 P.2d 557 6
James v. United States, 358 F. Supp. 1381 (1973) 7
Mobile Mechanical Contractors Assn. v. Carlough, 456 F. Supp 310 (1978) 9
People v. Love, 28 Ill. 304, 131 N.E. 809 6
Perry v. Arsham, 101 Ohio App. 285, 136 N.E.2d 141 (1956) 12
Reed v. Reed, 404 U.S. 71 (1971) 15
Rush v. St. Petersburg, 205 So. 2d 11 (Fla. App. D. 2) 6
Seligman v. Toledo Moving Picture Operators Union, 88 Ohio App. 137, 98 N.E.2d 54 (1947) 6
Sexton v. Barry, 233 F.2d 220 (6th Cir.) 10
Shapiro v. Thompson, 394 U.S. 618, 638 (1969) 14
Skinner v. Oklahoma ex. rel. Williamson, 316 U.S. 353 (1942) 15
Southern Railroad Company v. Green, 216 U.S. 400, 30 S. Ct. 287 10
Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948) 15
Truax v. Corrigan, 257 U.S. 312, 42 S. Ct. 124 10
Waldron v. British Petroluem, 231 F. Supp. 72 (S.D. N.Y. 1964) 13-14
Yick Ho v. Hopkins, 118 U.S. 356 (1896) 15

Constitutional Provisions, Statutes and Rules

Ohio Const., Art. I, §16 8
Ohio Rules of Civil Procedure, 54(D) 12
U.S. Const., Amend. XIV 2, 5, 6, 15
28 U.S.C. §1257(3) 2
42 U.S.C. §1981 11

No. .....

In the Supreme Court of the United States

October Term, 1980

JAMES P. FRACKELTON,
Petitioner,

vs.

GUS SWANSON, VIRGINIA SWANSON,
SHIA SHAPIRO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Ohio

James P. Frackelton petitions for a writ of certiorari to review the judgments of the Supreme Court of Ohio, entered February 26, 1981, overruling petitioner's motion for an order directing the Court of Appeals for Cuyahoga County, Ohio to certify its record, and dismissing petitioner's appeal.

OPINIONS BELOW

The Supreme Court of Ohio did not deliver an opinion, but acted by means of journal entries denying petitioner's motion to certify (Appendix A1) and dismissing the appeal (Appendix A2). The Court of Appeals for Cuyahoga County, Ohio delivered an opinion which is unreported

(Appendix A3). The Court of Common Pleas of Cuyahoga County, Ohio did not deliver an opinion. It granted respondents' motions to dismiss by means of journal entries (Appendix A9 and A10).

JURISDICTION

The judgments of the Supreme Court of Ohio overruling petitioner's motion to certify and dismissing his appeal were entered on February 26, 1981. The Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION

Fourteenth Amendment, United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of ctitizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdicton the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, James P. Frackelton, is a physician engaged in the practice of family medicine in the suburbs of Cleveland, Ohio. In September, 1972, respondent, Gus Swanson, requested petitioner to perform a bilateral vasectomy for the purpose of sterilizing Mr. Swanson. The operation was performed by petitioner, and thereafter, re-

spondent Gus Swanson was advised as to the necessity of certain post operative laboratory tests to confirm his sterility. After several such tests, on March 17, 1973, Mr. Swanson was pronounced sterile. Thereafter, respondent Virginia Swanson, Gus Swanson's wife, became pregnant and gave birth to a baby girl on February 28, 1974. Considering the normal range in the length of the human gestation period, respondent Virginia Swanson conceived, at the earliest, sometime in May 1973, two months after respondent Gus Swanson was conclusively pronounced sterile.

Despite actual knowledge of the results of Gus Swanson's laboratory tests, and despite an obvious alternative explanation of Virginia Swanson's pregnancy, on May 24, 1974, Gus and Virginia Swanson, through their attorney, respondent Shia Shapiro, filed an action in negligence and breach of warranty against petitioner in the Common Pleas Court of Cuyahoga County, Ohio, alleging that petitioner had improperly performed the vasectomy operation. During the course of the Swanson's negligence litigation, pursuant to a defense request Mr. Swanson was again tested and again confirmed to be sterile. Nevertheless, respondents persisted with their litigation. During the course of the trial, a directed verdict was granted in favor of petitioner.

The Swansons' negligence litigation had a serious affect upon petitioner, and caused him significant damage. Pressure as a result of the litigation prevented petitioner from devoting full attention to his professional activities and he was forced to resign as Chairman of the Department of Family Practice at Fairview General Hospital, Cuyahoga County, Ohio. Solely on account of the filing of the lawsuit, unfounded though it was, petitioner's medical malpractice insurance premiums were increased to such a degree that he was forced to change from a claims made

policy to a less protective occurrence policy. Petitioner's practice declined and the indignity, embarrassment, humiliation and nervousness eventually resulted in petitioner requiring extensive hospitalization and treatment for severe mental trauma.

Seeking redress for the unfounded claims made against him by respondents, petitioner thereafter filed a malicious prosecution and abuse of process action against respondents, Gus and Virginia Swanson, and their attorney, Shia Shapiro, alleging in detail all of the facts set out above and claiming that respondents' actions caused him damage resulting from abuse of civil process and malicious prosecution. Respondents moved to dismiss in the trial court, claiming that petitioner's failure to allege and establish either seizure of property or arrest of the person, a predicate for maintenance of a malicious prosecution or abuse of process action in Ohio, prevented him from stating a claim upon which relief would be granted. Respondent Shia Shapiro further claimed that as attorney for the Swansons, he was immune from any liability for actions taken on their behalf. The trial court granted the motions to dismiss without opinion.

Thereafter, an appeal was taken to the Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County, Ohio. The Court of Appeals affirmed the judgment of the Court of Common Pleas, holding that failure to allege either arrest or seizure of property constituted failure to state a cause of action for which relief could be granted. The Court of Appeals did not treat an assignment of error relating to maintenance of a malicious prosecution action against an attorney, in light of its holding that petitioner had failed to state a claim upon which relief could be granted.

Thereafter, petitioner moved the Supreme Court of Ohio for an order directing the Court of Appeals of Cuyahoga County to certify its record, and concurrently took an appeal as of right to the Supreme Court of Ohio. The Supreme Court of Ohio overruled the motion to certify, and *sua sponte*, dismissed the appeal "for the reason that no substantial constitutional question exists" (Appendix A2).

Petitioner has been injured by respondents' actions in filing the original negligence action against him, and their further prosecution thereof, but has been left without redress for those injuries. There exists a wrong against petitioner, for which no remedy has been provided. Consequently, petitioner has been denied due process of law and equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

FEDERAL QUESTIONS

The federal question, *i.e.* deprivation of due process and equal protection, inherent in the absence of a remedy, was raised by petitioner in his brief in opposition to respondents' motions to dismiss in the trial court, in his assignments of error and brief in the Ohio Court of Appeals, and his memorandum in support of jurisdiction in the Ohio Supreme Court. In each case, the court ignored this issue and ruled strictly on the requirement of arrest and/or seizure under Ohio law.

REASONS FOR ALLOWANCE OF THE WRIT

The facts as set out in the preceding section relate a classic violation of the common law maxim; "for every wrong there is a remedy". Clearly, Dr. Frackelton, petitioner herein, has been wronged gravely, but, because of the state courts' slavish application of an archaic and unreasonable restriction on the maintenance of a malicious prosecution action, petitioner has been denied a remedy. Consequently, he has been denied due process and equal protection guaranteed by the Fourteenth Amendment.

As a general proposition, the right to pursue one's occupation, including the practice of medicine, is one of the fundamental rights of citizens, under the United States Constitution and under state law, and one is entitled to have that right protected and secured, free from unreasonable interference. Such was the holding in Ohio, *Seligman v. Toledo Moving Picture Operators Union,* 88 Ohio App. 137, 98 N.E.2d 54 (1947) (right to pursue occupation of movie projector operator); and in numerous other states, *People v. Love,* 28 Ill. 304, 131 N.E. 809; *Rush v. St. Petersburg* (Florida App. D. 2) 205 So.2d 11; *In re Lifshutz,* 2 Cal. 3d 415, 467 P.2d 557 (right to practice medicine).

Improper interference with a recognized property right, in the form of a malicious prosecution of an individual such that his property right is thereby damaged, ought to find redress in a civil action for damages. Ohio's denial of the right of redress is thus, *a fortiori,* a denial of due process and equal protection, since the individual is without a remedy for his wrong. Ohio is among the minority of jurisdictions which require as a prerequisite for the maintenance of a malicious prosecution action the actual seizure of property or the physical arrest of the person.

The Court of Appeals in Ohio recognized as much at page 4 of its journal entry and opinion (Appendix A6). By contrast, a majority of jurisdictions have abolished the strict English rule requiring such seizure or arrest. Perpetuation of the restriction in Ohio contrasted with relief from that restriction in other jurisdictions, works an imimpermissible hardship on malicious prosecution plaintiffs in Ohio, which is not imposed on plaintiffs similarly situated elsewhere.

The principle that for every wrong there must be a remedy has been eloquently stated by the District Court for the District of Rhode Island in *James v. United States*, 358 F. Supp. 1381 (1973), wherein the Court considered whether there ought to be some constitutionally protected right of redress for a civil wrong. The Court stated:

> The protection of liberty, life and property offered by the Fourth and Fifth Amendments is basic to our constitutional jurisprudence. These protections are found in the constitutional tradition of English law, which formed the background for our own Constitution, and can be traced back to the Magna Charta. Clause 39 of the Magna Charta provided that
>
> > 'No man shall be in any sort destroyed unless it be by the verdict of his equals, or according to the law of the land.
> >
> > Coke's Second Institute. Commentary on the Magna Charta, published in 1642 by order of the House of Commons, in Pound, The Development of Constitutional Guarantees of Liberty 148 (1957).
>
> It would be peculiar indeed if Courts were able to imply remedies for statutory rights in securities laws, see J.I. Case v. Borak, 377 U.S. 426, 84 S. Ct. 1555,

12 L. Ed. 2d 423 (1964), but unable to provide an ordinary judicial remedy for invasion of rights protected by the supreme law, the Constitution, and basic in our scheme of liberties. See Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood, 117 U.Pa. L.Rev. 1 (1968).

> While money damages are indisputably among the traditionally available judicial remedies, it is true that the common law did not recognize actions for wrongful death. If, as *Bivens* holds, the source of the right sued upon is the Constitution, I would find it of little consequence whether in non-constitutional areas the cause of action is created by the legislature or existed at common law. *The Constitution itself is silent about causes of action, yet must have implicitly meant for there to be remedies for violations of protected rights.* See Hill, Constitutional Remedies, 69 Col. L.Rev. 1109, 115 n. 193 (1969). Thus, I would find the fact that this is a wrongful death action to be no impediment to a cause of action for damages based on the Fourth and Fifth Amendments. What other sort of action could there be for violation of the constitutional prohibition against the taking of life without due process? A remedy in damages would be appropriate. (Emphasis supplied.)

The Ohio Constitution as well provides for the right of redress in courts. Article I, Section 16 states:

> All courts shall be open, and every person, for an injury done him, in his land, goods, person, or reputation, shall have remedy by due process of law, and shall have justice administered without denial or delay.

A similar constitutional provision was considered by the United States District Court for the Southern District of Alabama in *Mobile Mechanical Contractors Assn. v. Carlough*, 456 F. Supp. 310 (1978). The Court considered a section of the Alabama Constitution which stated, similarly to the Ohio provision, that:

> . . . every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; . . .

The court stated:

> Alabama law has long recognized that the 'right to conduct one's business without the wrongful and injurious interference of others, is a valuable property right'.

The court allowed redress for a claim, where it was not otherwise redressable, reasoning as follows:

> Courts of Alabama recognize and are bound by the laws of the United States, because, as the Alabama Supreme Court stated in *Forsyth v. Central Foundry Co.*, 240 Ala. 277, 198 So. 706, 710(1940), [t]he laws of the United States are as much a part of the law of Alabama as its own local laws.

In short then, it cannot be questioned that the courts of the State of Ohio must give due deference to the requirements of the United States Constitution. In denying petitioner's right to sue for malicious prosecution in the State of Ohio, the Ohio Courts have ignored this responsibility.

In view of the federal constitutional implications of the right to pursue a remedy for the wrong present in the instant case, Ohio's refusal to recognize that right, when such right is required by the Federal Constitution, and

when such right is allowed and recognized in other jurisdictions, constitutes the clearest type of violation of equal protection which one can imagine.

It is perhaps almost a matter for judicial notice to acknowledge that in the past decade, there has been a virtual explosion in the field of medical malpractice lawsuits, which has been of national proportion, and which has national implications. Physicians, like other members of society, are increasingly mobile. Thus, the mere happenstance of a physician's domicile in a "minority" state such as Ohio, at the time of a malicious prosecution against him, rather than in one of the more enlightened majority view states, ought not affect the question of whether or not he has a constitutional right of redress for the wrong inflicted upon him through a maliciously prosecuted malpractice action. To afford the right to some, while denying it to others, merely on the basis of geography, is an unlawful discrimination which is condemned by the United States Constitution. The right of a physician, or any litigant to seek redress for malicious prosecution should be uniformly applied throughout the United States.

Equal protection of the laws is only met when courts are open to all litigants on the same conditions as to others in like circumstances, with like rules of evidence and modes of procedure, for the redress of wrongs. *Truax v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124, *Southern Railroad Company v. Greene*, 216 U.S. 400, 30 S. Ct. 287.

In short, in the words of the Sixth Circuit Court of Appeals, equal protection of the law implies that all litigants similarly situated may appeal to the courts for both relief and defense under like conditions, with like protection, and without discrimination. *Sexton v. Barry* (6th Cir.) 233 F.2d 220. This Court itself, at an early date, recognized

the rule that the grant to one individual of certain rights denied to another similarly situated could be successfully challenged on the ground of unjust discrimination and denial of equal protection of the laws. *Backus v. Fort Street Union Depot Company,* 169 U.S. 557, 18 S. Ct. 445. The right to redress any wrong in the courts should be unaffected by the place of residence. Indeed, by statute, "all persons in the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings. . ." (42 U.S.C. §1981.) Because malicious prosecution victims in Ohio are not afforded the same protection as those similarly situated in other jurisdictions, because they are denied redress for wrongs to their constitutionally protected property rights, they are deprived of the equal protection of the laws.

Even if local variations in the right to bring an action for malicious prosecution are deemed not to violate the guarantee of equal protection, Ohio's application of the strict "English" rule requiring arrest or seizure is unreasonable, and as such, violates due process. Ohio's rule is known as the "English" rule because of its roots in 13th Century English law. Actions for malicious prosecution had their origin in England, and it is important to understand the historical context of the English rule. Prior to the passage of the Statute of Marlbridge, in 1269, actions to recover damages for malicious prosecutions, even where neither the person nor the property of the plaintiff had been interfered with, *were* entertained in English courts. With passage of the Act, such suits were foreclosed if they arose out of a civil action and if there had not been an arrest or seizure of property. However, to assure that pre-existing common law damages were not displaced, the Act provided a summary remedy in their stead—*payment of*

all costs to a defendant who prevailed, including attorneys fees, witness fees, and all court costs. In cases of a prior arrest or seizure of property, even such "costs" were still thought to be an inadequate measurer of compensation, and in those instances an action in malicious prosecution remained. Ohio courts uncritically accepted the English rule, despite the fact that the rationale for its existence in England is totally absent in American Jurisprudence. The explanation for the rule in Ohio is contained in *Perry v. Arsham*, 101 Ohio App. 285, 136 N.E.2d 141 (1956). In that case, the Court of Appeals of Cuyahoga County, Ohio, stated:

> This Ohio rule is spoken of as the strict view and arguments in its favor are generally stated as follows:
>
> (1) costs are given as adequate redress; (2) courts should be free and open to all without fear of being sued in return; (3) freely permitting malicious prosecution actions would make ligitation interminable; (4) defendant should have no right to a malicious prosecution action since plaintiff has no action if a defense is malicious and groundless.

An analysis of this rationale discloses that it simply does not apply to American Jurisprudence.

While Rule 54D of the Ohio Rules of Civil Procedure permits a court, in its discretion, to assess costs to the prevailing party, these costs are generally limited to statutory court costs and witness fees. Unlike the English system of costs, which replaced the liberal malicious prosecution standards, Ohio Courts do not reimburse injured defendants for attorney fees which represent the greatest expense of the defense. Assessment of costs in the context of American Jurisprudence most assuredly is not an adequate remedy. Ohio's adherence to the English is out of

context and misplaced. The underpinning of the rule is absent in Ohio, and it must fall of its own weight.

Nor would the more liberal rule necessarily result in interminable litigation. While courts are properly concerned with the expanding size of their civil dockets, it does not logically follow that acceptance of the liberal rule would open the floodgates. The still strict requirement of proving malice and lack of probable cause is sufficient detriment to the institution of a "frivolous" malicious prosecution action. Furthermore, the requirement of allegation and proof of actual arrest and seizure deprives the malicious prosecution plaintiff, having successfully defended a frivolous and malicious lawsuit, the same right which the strict view purports to protect, the right to go into a free and open court system, unfettered by artificial barriers to prosecute a cause when wronged. The Ohio Court of Appeals, in affirming the judgment of the trial court relied on these and other "important policy considerations" in support of the continued application of the English rule, without any genuine analysis of the validity of the policies asserted therefor. The United States Court of Appeals of the Sixth Circuit rejected the notion that crowded court calendars should be a justification for limiting access to a litigant for redress of a wrong. In *Ingram v. Richardson*, 471 F.2d 1268 (1972), the Court stated:

> But the problem of a crowded docket must not be allowed to close the door to a litigant who has a statutory right of review by a court.

This is all the more so when the right to redress is constitutionally protected.

Likewise, the invocation of the "public policy" justification, must not be lightly made. In *Waldron v. British*

Petroleum, 231 F. Supp. 72 (S.D.N.Y. 1964) the court stated:

> Violation of public policy may not be loosely invoked as a reason for depriving a litigant of his day in court.

While *British Petroleum* involved the question whether the litigant's violation of public policy should be enough to deprive him of standing to sue, the court's conclusion that it was not seems all the more forceful when viewed against a rather vague and non-specific claim of public policy considerations asserted by Ohio courts in denying all malicious prosecution litigants access under the circumstances of this case.

Viewed against the backdrop of constitutional due process requirements, the Ohio rule cannot stand. Restrictions on constitutionally guaranteed access to courts, if they may stand at all, must be reasonable, and calculated to advance some genuine public policy. The Ohio Rule does not. When weighed against the deprivation of the right to redress for wrong guaranteed by the constitution, it must fail. To justify discriminatory action denying a fundamental right such as a right to access to the courts, the state must show that the discriminatory classification "promotes a compelling state interest". *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969). The state has shown no such compelling interest.

Likewise, denial of any right of cause of action against an attorney who acts irresponsibly in filing a malicious prosecution action is similarly a discrimination which is condemned by the United States Constitution. When a denial of due process is involved, it is necessary to focus not on the status of the party/defendant, but on the substantive conduct involved. If a cause of action for malic-

ious prosecution exists, it must apply with equal force to an attorney defendant. This Court has, through numerous decisions elucidated the meaning of equal protection. See *e.g., Griffin v. Illinois* (1956), 351 U.S. 12; *Skinner v. Oklahoma ex rel. Williamson* (1942), 316 U.S. 353; *Takahashi v. Fish and Game Commission* (1948), 334 U.S. 410; *Yick Wo v. Hopkins* (1896), 118 U.S. 356; *Reed v. Reed* (1971), 404 U.S. 71; *Baker v. Carr* (1962), 369 U.S. 186; *Brown v. Board of Education* (1954), 347 U.S. 483; and *Douglas v. California* (1963), 372 U.S. 353. In each instance, where the court found denial of equal protection, the state was found to have discriminated against the basic rights of persons who were, in fact, substantively in no different position than the remainder of society and yet they were treated differently. In point of fact, it makes little difference to a malicious prosecution victim whether the irresponsible and malicious action was put in motion by the clients, or by their attorney. In either case, the damage is the same and the victim ought to have a right of redress.

CONCLUSION

This court now has before it an opportunity to address the familiar issue of equal protection and due process in the context of recognizing the constitutional right to redress of a victim of malicious prosecution. The principles established by the Fourteenth Amendment ought to touch all members of society. In Ohio, they do not. Rights as fundamental as those involved here, should have no limitations.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DONALD M. ROBINER, *Counsel of Record*
PAUL F. LEVIN
SCHWARZWALD, ROBINER, WOLF & ROCK,
A Legal Professional Association
1700 Ohio Savings Plaza
1801 East Ninth Street
Cleveland, Ohio 44114
(216) 781-1700
Counsel for Petitioner

APPENDIX

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY

(Dated February 26, 1981)

No. 80-1827

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

JAMES P. FRACKELTON,
Appellant,

vs.

GUS SWANSON, *et al.*,
Appellees.

MOTION FOR AN ORDER DIRECTING ITS COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING THE APPEAL

(Dated February 26, 1981)

No. 80-1827

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

JAMES P. FRACKELTON,
Appellant,

VS.

GUS SWANSON, *et al.*,
Appellees.

APPEAL FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS

(Dated October 16, 1980)

No. 41921

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

JAMES P. FRACKELTON,
Plaintiff-Appellant,

vs.

GUS SWANSON, *et al.*,
Defendant-Appellees.

JOURNAL ENTRY AND OPINION

PRYATEL, *J.*

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

Appellant James Frackelton was the defendant in an action based upon breach of warranty and negligence instituted by appellees Gus and Virginia Swanson and filed by their attorney, Shia Shapiro. Appellant had performed a vasectomy upon Gus Swanson; however, Virginia Swan-

son subsequently became pregnant and delivered a child. Appellant eventually prevailed in that lawsuit, obtaining a directed verdict against the Swansons.

He then filed a complaint, which is the subject of the instant appeal, against the Swansons and their attorney. Appellant alleged that appellees maliciously and without probable cause initiated their lawsuit against him while knowing that "laboratory tests conclusively showed that it was medically impossible for Gus Swanson to impregnate Virginia Swanson or any woman." Appellant further alleged that appellees' conduct in preparing, filing and continuing their suit against him was "reckless, willful, wanton and malicious," since they failed to prepare and investigate their claim adequately. Significantly, appellant complained of appellees' failure at any time to engage a qualified medical expert to support their action against him.

Appellees filed separate motions to dismiss, contending that appellant failed to state claims upon which relief could be granted.

Appellant filed a motion in opposition.

The trial court considered the parties' motions, supported by briefs upon the law, and found in favor of appellees, granting their respective motions to dismiss appellant's complaint.

Appellant presents four assignments of error. We shall discuss the first two assignments of error together, since they entail a common issue:

A. FOR PURPOSES OF A RULE 12(B)(6) MOTION, ALL WELL PLEADED ALLEGATIONS IN THE COMPLAINT MUST BE TAKEN AS TRUE.

B. A MALICIOUS PROSECUTION AND ABUSE OF CIVIL PROCESS ACTION IS MAINTAINABLE UNDER THE FACTS AS ALLEGED

1. THE COMPLAINT ADEQUATELY STATES A CAUSE OF ACTION IN MALICIOUS PROSECUTION FOR WHICH RELIEF MAY BE GRANTED.

2. THE FACTS ALLEGED IN THE COMPLAINT MEET EVEN THE STRICT RULE REQUIREMENTS OF ARREST OR SEIZURE OF PROPERTY.

A review of appellant's complaint below indicates that he alleged he was:

> "caused to suffer great indignity, embarrassment, humilitation, nervousness and inability to properly concentrate in his professional activities. Furthermore, plaintiff has been injured in his property through increased costs of insurance coverage for medical malpractice and loss of business."

Nowhere does appellant's complaint show that he was arrested or had his property seized as a consequence of the appellees' initiation of their suit against him. Ohio has consistently held that a suit claiming malicious prosecution of a prior civil action will not lie absent a showing that there has been either an arrest of the person or a seizure of property. *Cincinnati Daily Tribune v. Bruck* (1900), 61 Ohio St. 489; *Avco Delta Corp. v. Walker* (Franklin Cty. 1969), 22 Ohio App. 2d 61; *Delk v. Colonial Finance Co.* (Hamilton Cty. 1963), 118 Ohio App. 451; *Perry v. Arsham* (Cuyahoga Cty. 1956), 101 Ohio App. 285; *Muntz v. Muntz* (Cuyahoga Cty. Sept. 20, 1979), Unreported No. 39208.

While the Ohio rule represents a minority view, important policy considerations support its continued application. First, litigants should have ready access to courts without risking liability for unsuccessful suits. Second, were suits for malicious prosecution more easily used, disputes in litigation would tend to be perpetuated, rather than be concluded. While other elements* must be proved in an action for malicious prosecution, the availability of a remedy for purported malicious prosecution without the arrest of a person or seizure of his property would loom as an uncertain threat against plaintiffs, discouraging their pursuit of bona fide claims.

Since appellant failed to allege either his arrest or seizure of property, his complaint failed to state a cause of action for which relief could be granted. The trial court properly dismissed such complaint for malicious prosecution.

Accordingly, we overrule appellant's first two assignments of error.

C. THE COMPLAINT ADEQUATELY MAKES OUT A CAUSE OF ACTION FOR ABUSE OF PROCESS.

An action alleging malicious prosecution focuses upon the fact that civil process was employed for its ostensible purpose, but was instituted without reasonable or probable cause. On the other hand, an action is deemed an abuse

---

*1. The original action was instituted and/or pursued at the instance of the defendants.

2. The original action was terminated in plaintiff's favor.

3. The defendants lacked probable cause to institute and/or pursue the original action.

4. The defendants acted with malice in instituting and/or pursuing the original action.

5. The plaintiff sustained damage as a proximate result of the institution and/or pursuit of the original action.

of process where process, once obtained for whatever reason, is willfully perverted to accomplish an end not lawfully available by such process. *Cf., Avco Delta Corp. v. Walker, supra*; *Bunde v. Kantorik* (Cuyahoga Cty. May 17, 1979), Unreported No. 38837. In short, an action for abuse of process is concerned with the improper use of process after it has been issued.

Paragraph 8 of appellant's complaint below states:

> 8. Defendants' conduct in preparing and filing the aforementioned complaint and continuing to pursue said action against plaintiff James P. Frackelton without adequate preparation and investigation was reckless, willful, wanton and malicious, and constituted a clear abuse of civil process and malicious prosecution.

In his brief in opposition to appellees' motions to dismiss, appellant contended that the liberal pleading allowed by the Ohio Rules of Civil Procedure warranted the inference that the above language alleged an abuse of process by appellees:

> It is sufficient to allege that the institution and continuation of a frivolous action was willful, wanton and malicious to make out a prima facie allegation of abuse of process. It may be inferred from defendants' baseless actions that there was some ulterior and improper motive to them *since it must be assumed from the allegations there was no grounds* [*sic*] *for a negligence or breach of warranty action.* (emphasis added) (Brief, p. 12).

Examination of appellant's argument shows that he is merely reiterating allegations which support a cause of action in malicious prosecution. The complaint is devoid of facts or allegations of any action taken by appellees not authorized by process.

Accordingly, we overrule appellant's third assignment of error.

D. A MALICIOUS PROSECUTION ACTION CAN BE MAINTAINED AGAINST AN ATTORNEY AT LAW, BASED UPON HIS CAPACITY AS SUCH IN A PREVIOUS ACTION.

In light of our disposition of the first two assignments of error, we need not treat this assignment. The issue is moot.

For the above reasons, we affirm the judgment below.

It is ordered that appellee(s) recover of appellant their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ AUGUST PRYATEL
Judge

STILLMAN, P.J. CORRIGAN, J., concur.

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Dated April 5, 1979)

No. 992397

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, CUYAHOGA COUNTY

JAMES P. FRACKELTON,
Plaintiff,

VS.

GUS SWANSON, VIRGINIA SWANSON, AND SHIA SHAPIRO,
Defendants.

Defendants Gus and Virginia Swanson's Motion to Dismiss Granted. Complaint dismissed with prejudice at Plaintiff's costs.

/s/ LEO M. DEGRANDIS
Judge

JUDGMENT ENTRY IN THE COURT OF COMMON PLEAS

(Dated March 26, 1979)

No. 992397

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, CUYAHOGA COUNTY

JAMES P. FRACKELTON,
Plaintiff,

vs.

GUS SWANSON, VIRGINIA SWANSON, AND SHIA SHAPIRO,
Defendants.

Defendant Shapro's Motion to Dismiss Granted. Complaint dismissed with prejudice at Plaintiff's costs.

/s/ LEO M. DEGRANDIS
Judge

Office-Supreme Court, U.S.
FILED
JUN 29 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2016

In the Supreme Court of the United States

October Term, 1980

JAMES P. FRACKELTON,
Petitioner,

vs.

GUS SWANSON, VIRGINIA SWANSON,
SHIA SHAPIRO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
OHIO SUPREME COURT

RESPONDENT, SHIA SHAPIRO'S, BRIEF IN OPPOSITION

C. REYNOLDS KELLER, *Counsel of Record*
DONALD H. SWITZER
WESTON, HURD, FALLON, PAISLEY & HOWLEY
2500 Terminal Tower
Cleveland, Ohio 44113
216/241-6602
Counsel for Respondent, Shia Shapiro

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED FOR REVIEW

I. Whether the petitioner sufficiently and properly raised the federal questions in the state courts so that the state courts could consider and pass upon the federal questions thereby properly invoking the jurisdiction of this Court under 28 U.S.C.A. Section 1257(3).

II. Whether the long standing requirement under Ohio common law that an individual asserting a claim for malicious prosecution must allege as an element of damage either arrest of his person or seizure of his property constitutes a denial to that individual of due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

III. Whether the petitioner has been deprived of due process of law or equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution because he lacked standing to assert a claim for malicious prosecution against respondent Shia Shapiro, the attorney for respondents Swansons.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the Supreme Court of Ohio are all those parties listed in the caption of the the case in this Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW I
PARTIES TO THE PROCEEDING II
CONSTITUTIONAL PROVISION 1
STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 6
ARGUMENT 7

I. The Petitioner Failed to Properly Invoke the Jurisdiction of This Court Under 28 U.S.C.A. Section 1257(3) by Failing to Sufficiently and Properly Raise the Federal Questions in the State Courts 7

II. The Ohio Common Law Requirement That a Complaint Asserting a Claim for Malicious Prosecution Must Allege That the Plaintiff Was Arrested or Had Property Seized As a Result of Judicial Process Issued in the Prior Lawsuit Does Not Violate the Due Process of Law or Equal Protection Clauses of the Fourteenth Amendment 10

III. A Malicious Prosecution Action May Not Be Maintained by a Third Person Against an Attorney Who Prosecuted the Alleged Malicious Litigation on Behalf of, and With the Authority of, His Clients 14

CONCLUSION 16

APPENDIX:

Ohio Rules of Civil Procedure Rule 12(B) 17
Ohio Rules of Evidence Rule 601(D) 18
Ohio Revised Code Section 2743.43 18

TABLE OF AUTHORITIES

Cases

Alexander v. Mt. Carmel Medical Center, 56 Ohio St. 2d 155 (1978) 13
Avco Delta Corp. v. Walker, 22 Ohio App. 2d 61 (Franklin Cty., 1969) 10, 11
Bailey v. Anderson, 326 U.S. 203 (1945) 8
Board of Education v. Marting, 7 Ohio Misc. 64 (C.P. Madison Cty., 1966) 11
Board of Regents v. Roth, 408 U.S. 564 (1972) 13
Boddie v. Connecticut, 401 U.S. 371 (1971) 12, 13
Bruni v. Tatsumi, 46 Ohio St. 2d 127 (1976) 13
Chicago, I. & L. R. Co. v. McGuire, 196 U.S. 129 (1905) 8
Cincinnati Daily Tribune v. Bruck, 61 Ohio St. 489 (1900) 10
Dakters v. Shane, 64 Ohio App. 2d 196 (Lorain Cty., 1978) 10
Delk v. Colonial Finance Co., 118 Ohio App. 451 (Hamilton Cty., 1963) 11
Pennsylvania Railroad Co. v. Illinois Brick Co., 297 U.S. 447 (1936) 8
Perkins v. Benquet Consolidated Mining Co., 342 U.S. 437 (1952) 9
Perry v. Arsham, 101 Ohio App. 285 (Cuyahoga Cty., 1956) 11
Sidney Street v. State of New York, 394 U.S. 576 (1969) 8
Skarbinski v. Henry H. Krause Co., 378 F.2d 656 (6th Cir., 1967) 10
State, ex rel. Babcock v. Perkins, 165 Ohio St. 185 (1956) 9
State v. Williams, 51 Ohio St. 2d 112 (1977) 9

W.D.G., Inc. v. Mutual Manufacturing & Supply Co., 5 Ohio Op. 3d 397 (Ohio App., Franklin Cty., 1976) 10, 14

Constitutional Provisions

United States Constitution, Amendment XIV 1, 5, 9, 10, 12, 14

Statutes

28 U.S.C.A. Section 1257(3) 6, 7, 8, 10
Ohio Revised Code Section 2743.43 13

Rules

Ohio Rules of Civil Procedure, Rule 12(B) 4
Ohio Rules of Evidence, Rule 601(D) 13

No. 80-2016

In the Supreme Court of the United States

October Term, 1980

JAMES P. FRACKELTON,
Petitioner,

vs.

GUS SWANSON, VIRGINIA SWANSON,
SHIA SHAPIRO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

RESPONDENT, SHIA SHAPIRO'S, BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISION

United States Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 7, 1978, petitioner James P. Frackelton instituted this action by filing a complaint in the Court of Common Pleas of Cuyahoga County, Ohio, setting forth two causes of action: malicious prosecution and abuse of civil process. The complaint alleged that respondents, Gus Swanson and Virginia Swanson, by and through their attorney, respondent Shia Shapiro, maliciously and without probable cause filed a prior lawsuit against the petitioner for breach of warranty and negligence arising out of the petitioner's performance of a vasectomy upon Gus Swanson. After the vasectomy, Virginia Swanson became pregnant and delivered a child. The petitioner obtained a directed verdict at the close of the Swansons' case in the prior lawsuit.

The complaint in this case was dismissed, as to all respondents, for failure to state a claim upon which relief could be granted. The following allegations appeared in the complaint.

On or about May 24, 1974, Gus Swanson and Virginia Swanson caused to be filed, by and through their attorney, Shia Shapiro, a complaint for breach of warranty and negligence against the petitioner. This complaint alleged that the petitioner was negligent in performing a vasectomy upon Gus Swanson, and by this negligence breached warranties concerning the said operative procedure. As a result of the negligence and breach of warranty, Virginia Swanson became pregnant and delivered a child on February 28, 1974.

The instant complaint alleges that at the time of filing the prior lawsuit, it was known to the defendants that laboratory tests conclusively showed that it was medically im-

possible for Gus Swanson to impregnate Virginia Swanson or any other woman. Nonetheless, the respondents maliciously and without probable cause instituted the lawsuit.

The complaint further alleges that prior to the initiation of the litigation and continuing into the discovery stage of the proceedings, the respondents failed to engage a qualified medical expert to support the fabricated theory of negligence and breach of warranty. The trial court, by means of a pretrial order on May 3, 1977, required that such an expert be identified and that if such information was not forthcoming by a certain date, introduction of expert medical testimony at the time of the trial would be barred. On the first day of trial, no qualified expert having been produced to substantiate the unfounded claims, the court granted the petitioner's Motion in Limine barring the respondents from presenting any expert medical testimony on their behalf at the trial. The Motion was unopposed. At the close of the respondents' case, the court granted the petitioner's Motion for a Directed Verdict.

The complaint alleges that during the interim of the prior lawsuit, the petitioner was deprived of not only his mental well-being but his property as well, to-wit: The pressure from said lawsuit mandated his resignation as Chairman of the Department of Family Practice at Fairview General Hospital; his insurance premiums increased significantly, and he was eventually forced to switch from an occurrence policy to a claims made policy; and great sums of money were spent for hospitalization because of the mental trauma occasioned by the filing of the lawsuit. The complaint further alleges that the petitioner was caused to suffer great indignity, embarrassment, humiliation, nervousness and inability to concentrate in his professional activities. Petitioner was injured in his property through increased costs of insurance coverage for medical malpractice and loss of business.

In paragraph 8 of the complaint, it is alleged that respondents' conduct in preparing and filing the aforementioned complaint and continuing to pursue said action against plaintiff without adequate preparation and investigation was reckless, willful, wanton and malicious, and constituted a clear abuse of civil process and malicious prosecution.

The complaint lacked any allegation that, as a result of the prior lawsuit, the petitioner was arrested, had property seized as a result of judicial process, was the subject of a forcible entry and detainer, or that the respondents caused a temporary restraining order or injunction to be issued against the petitioner. There was no allegation that the defendants improperly or wrongfully used any process issued in the prior lawsuit. These are essential allegations for maintenance of a malicious prosecution or abuse of civil process action in Ohio.

Because of the petitioner's failure to allege all of the essential elements necessary to state a claim for malicious prosecution or abuse of civil process, respondents Swanson and respondent Shapiro each filed a Motion to Dismiss the Complaint, pursuant to Rule 12(B)(6) of the Ohio Rules of Civil Procedure (A. 17), for failure to state a claim upon which relief can be granted. Respondent Shapiro, as the Swansons' attorney, was also immune from claims based upon malicious prosecution or abuse of civil process. In his Brief in Opposition to the Motions to Dismiss, the petitioner raised no constitutional issues. (This Brief has been lodged with the clerk of the Supreme Court.)

In separate orders journalized on January 3, 1980, the trial court granted the Motions to Dismiss. The complaint was dismissed with prejudice. The trial court did not write an opinion.

The petitioner appealed the trial court's decision to the Court of Appeals for the Eighth Appellate District. The petitioner did not raise any error that the judgment of the trial court was in contravention of petitioner's rights under the 14th Amendment to the United States Constitution in his Assignment of Error and Brief filed in the Court of Appeals. (This Brief has been lodged with the Clerk of the Supreme Court.) The Court of Appeals affirmed the judgment of the trial court.

The petitioner then moved the Supreme Court of Ohio for an order directing the Court of Appeals to certify its record and concurrently filed an appeal as of right to the Supreme Court of Ohio. The alleged deprivation of due process and denial of equal protection was raised by the petitioner for the first time in his Memorandum in Support of Jurisdiction to the Supreme Court of Ohio. The petitioner's only reference to the alleged constitutional violations was that:

> Application of the strict English rule deprives successful defendants in Ohio of due process and equal protection as afforded them under the constitution of the United States and Ohio. It established a separate classification of litigants and denies them entry to the court system and a remedy for their wrongs.

The Supreme Court overruled the motion to certify and *sua sponte* dismissed the appeal for the reason that no substantial constitutional question existed.

The Ohio courts applied long-standing and well established Ohio law with respect to the elements necessary to properly plead and maintain an action for malicious prosecution. Contrary to petitioner's erroneous statement in his Petition, the federal question was not raised by petitioner until his appeal to the Supreme Court of Ohio.

SUMMARY OF ARGUMENT

The federal question presented by petitioner for review was not raised by petitioner in the Court of Common Pleas or in the Court of Appeals in the state court. It was not until petitioner appealed to the Ohio Supreme Court that he raised the federal question. The constitutional issues raised in the federal question were not properly before the Ohio Supreme Court, were not considered by the Ohio Supreme Court and the dismissal of petitioner's complaint was affirmed on grounds of state law. Therefore, the petitioner has not properly invoked the jurisdiction of this Court under 28 U.S.C.A. Section 1257(3) and the Petition for a Writ of Certiorari must be dismissed.

The Ohio law on malicious prosecution is based on common law and is long standing. The petitioner asks this Court to create a national cause of action for malicious prosecution—a request which is clearly improper as malicious prosecution is a matter of state law. The petitioner was treated equally with all other malicious prosecution plaintiffs in Ohio and has not been denied equal protection of the laws. The petitioner was afforded due process of law in the alleged malicious litigation. The petitioner does not have a property right or a claim of entitlement to being able to maintain a malicious prosecution claim. Since he had no prior right to maintain the action then he has not been deprived of due process of law. The states' interest in maintaining free, unfettered access to the courts is sufficient justification for limiting the scope of malicious prosecution.

Nor was petitioner deprived of any constitutional rights by his lack of standing to state a claim for malicious prosecution against respondent Shia Shapiro, the attorney for respondents Swansons. Ohio law is clear that the malicious

prosecution claim, if at all, can only be maintained against the Swansons not their attorney. The attorney's duty is to his clients not the petitioner. The potential chilling effect on the zealous representation which an attorney owes to his clients is sufficient justification for not permitting the petitioner to maintain a malicious prosecution claim against respondent Shia Shapiro.

ARGUMENT

I. THE PETITIONER FAILED TO PROPERLY INVOKE THE JURISDICTION OF THIS COURT UNDER 28 U.S.C.A. SECTION 1257(3) BY FAILING TO SUFFICIENTLY AND PROPERLY RAISE THE FEDERAL QUESTIONS IN THE STATE COURTS.

The petitioner seeks to invoke the jurisdiction of this Court by virtue of 28 U.S.C.A. Section 1257(3) which provides that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

In order to properly invoke this Court's jurisdiction under 28 U.S.C.A. Section 1257(3), it is mandatory that the petitioner raised the federal question in the state courts so that the issues could have been considered and passed upon prior to review by this Court. If the federal question was not properly raised in the state courts then this Court has no power to consider it. The rule was stated in *Sidney Street v. State of New York*, 394 U.S. 576, 581, 582 (1969):

> Hence, in order to vindicate our jurisdiction to deal with this particular issue, we must inquire whether that question was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed appellant's conviction. If the question was not so presented, then we have no power to consider it. See 28 USC §§ 1257(2), 1257(3); Bailey v. Anderson, 326 U.S. 203, 206-207, 90 L Ed 3, 5, 6, 66 S Ct 66 (1945). Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.

Bailey v. Anderson, 326 U.S. 203 (1945); *Pennsylvania Railroad Co. v. Illinois Brick Co.*, 297 U.S. 447 (1936); *Chicago, I. & L. R. Co. v. McGuire*, 196 U.S. 129 (1905).

The petitioner has the burden of showing that the Ohio Supreme Court properly considered and ruled upon the federal questions. This the petitioner has failed to do. Furthermore, the federal questions were not properly brought before the Ohio Supreme Court.

The petitioner's Brief in Opposition to the Motions to Dismiss, which was filed in the Common Pleas Court, and

the petitioner's Assignments of Error and Brief filed in the Court of Appeals, *did not* raise the federal questions at any time, e.g. the petitioner's claim that the Ohio law on malicious prosecution which requires an arrest of person or seizure of property as an element of damage in the prior lawsuit constitutes a violation of the due process of law and equal protection clauses of the Fourteenth Amendment. This issue was not raised until petitioner filed his Memorandum in Support of Jurisdiction in the Ohio Supreme Court. And even then, the issue was only one of six (6) "propositions of law" before the Ohio Supreme Court. The petitioner has not and cannot show that the Ohio Supreme Court even considered the federal question in overruling petitioner's motion to certify and dismissing his appeal.

The Ohio Supreme Court does not consider any claim of error which was not raised in the Court of Appeals. The rule is set forth in paragraph 3 of the syllabus in *State, ex rel. Babcock v. Perkins,* 165 Ohio St. 185 (1956):

> 3. Where an appeal on questions of law is taken to the Supreme Court from the Court of Appeals, which latter court had jurisdiction of the subject matter of and the parties to the action, the Supreme Court will not consider or determine claimed errors which were not raised and preserved in the Court of Appeals.

The syllabus of an opinion of the Ohio Supreme Court states the law in Ohio. *Perkins v. Benquet Consolidated Mining Co.,* 342 U.S. 437 (1952). Nor does the fact that the petitioner is raising a constitutional question alter the rule. *State v. Williams,* 51 Ohio St. 2d 112 (1977). Since the petitioner did not raise the federal question in the Common Pleas Court or Court of Appeals then it was not properly before the Ohio Supreme Court and was not a basis for the Ohio Supreme Court's decision.

Therefore, the petitioner, by failing to properly raise the federal question in the state courts, has not invoked the jurisdiction of this Court under 28 U.S.C.A. Section 1257(3). The Petition for a Writ of Certiorari must be dismissed.

II. THE OHIO COMMON LAW REQUIREMENT THAT A COMPLAINT ASSERTING A CLAIM FOR MALICIOUS PROSECUTION MUST ALLEGE THAT THE PLAINTIFF WAS ARRESTED OR HAD PROPERTY SEIZED AS A RESULT OF JUDICIAL PROCESS ISSUED IN THE PRIOR LAWSUIT DOES NOT VIOLATE THE DUE PROCESS OF LAW OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

The elements necessary to state a claim for malicious prosecution are firmly entrenched in Ohio law. One essential element is that the plaintiff must have been arrested or had property seized as a result of judicial process issued in the alleged malicious lawsuit.

This well established principle of Ohio law was succinctly stated in Paragraph 1 of the syllabus in *Cincinnati Daily Tribune Co. v. Bruck*, 61 Ohio St. 489 (1900):

> As a general rule no suit will lie for the malicious prosecution of a civil action, where there has been no arrest of the person or seizure of property.

This "arrest or seizure of property requirement" has been consistently applied by the courts in Ohio. *Skarbinski v. Henry H. Krause Co*, 378 F.2d 656 (6th Cir., 1967); *Dakters v. Shane*, 64 Ohio App. 2d 196 (Lorain Cty., 1978), *m.c.o.* (September 7, 1978); *W.D.G., Inc. v. Mutual Manufacturing & Supply Co.*, 5 Ohio Op. 3d 397 (Ohio App., Franklin Cty., 1976); *Avco Delta Corp. v. Walker*, 22 Ohio

App. 2d 61 (Franklin Cty., 1969); *Delk v. Colonial Finance Co.*, 118 Ohio App. 451 (Hamilton Cty., 1963); *Perry v. Arsham*, 101 Ohio App. 285 (Cuyahoga Cty., 1956); *Board of Education v. Marting*, 7 Ohio Misc. 64 (C.P. Madison Cty., 1966). The petitioner's complaint failed to allege this essential element and it was appropriately dismissed.

The reasons for the rule were succinctly stated by the Court of Appeals in petitioner's case:

> While the Ohio rule represents a minority view, important policy considerations support its continued application. First, litigants should have ready access to courts without risking liability for unsuccessful suits. Second, were suits for malicious prosecution more easily used, disputes in litigation would tend to be perpetuated rather than be concluded. While other elements must be proved in an action for malicious prosecution, the availability of a remedy for purported malicious prosecution without the arrest of a person or seizure of his property would loom as an uncertain threat against plaintiffs, discouraging their pursuit of bona fide claims (page 4).

Additional reasons were set forth in *Perry v. Arsham*, 101 Ohio App. 285 (Cuyahoga Cty., 1956). Clearly though, the policy considerations concerning the potential chilling effect on the open, unfettered access to the courts are the most important.

The petitioner argues that he has been denied equal protection of the laws because he was unable to state a claim for malicious prosecution. The petitioner says that "[p]erpetuation of the restriction in Ohio contrasted with relief from that restriction in other jurisdictions, works an impermissible hardship on malicious prosecution plaintiffs in Ohio, which is not imposed on plaintiffs similarly sit-

uated elsewhere" (p. 7). The petitioner further says that "[t]o afford the right to some, while denying it to others, merely on the basis of geography, is an unlawful discrimination which is condemned by the United States Constitution . . . [t]he right of a physician, or any litigant to seek redress for malicious prosecution should be uniformly applied throughout the United States" (p. 10). For purposes of petitioner's equal protection argument it is clear that the two (2) classes are plaintiffs in the State of Ohio versus plaintiffs in a state which follows the "majority" rule.

The lack of merit of petitioner's equal protection argument is obvious. The Fourteenth Amendment says that no state shall "deny to any person *within its jurisdiction* the equal protection of the laws". The petitioner does not claim that Ohio law discriminates between two (2) classes of plaintiffs in Ohio. And petitioner cannot make such a claim because all malicious prosecution plaintiffs in Ohio are treated equally.

The petitioner is not a member of a "suspect class"; has not been discriminated against because he is a member of a class and has been treated equally with all other malicious prosecution plaintiffs in Ohio. Therefore, the petitioner has not been denied equal protection of the laws.

Nor was petitioner deprived of due process of law because he was unable to state a claim for malicious prosecution. The petitioner claims that he was denied access to the courts thereby depriving him of a property interest without due process of law. The petitioner asks this Court to change the elements of a malicious prosecution cause of action in Ohio so as to allow petitioner to state a claim.

Access to state courts is a property interest protected by the Fourteenth Amendment. *Boddie v. Connecticut*, 401 U.S. 371 (1971). However, as this Court noted in *Boddie*:

> The legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain. 401 U.S. at 375, 376.

The petitioner had an "effective alternative" and, in fact, was afforded due process of law because of his access to the courts. The petitioner obtained a directed verdict against respondents, in the medical malpractice lawsuit, because respondents failed to retain a medical expert to testify at trial. While expert medical testimony is not absolutely necessary in all medical malpractice cases, the courts in Ohio have placed great emphasis on its need. *Alexander v. Mt. Carmel Medical Center,* 56 Ohio St. 2d 155 (1978); *Bruni v. Tatsumi,* 46 Ohio St. 2d 127 (1976). Furthermore, the Ohio Legislature has afforded medical malpractice defendants a special degree of protection by establishing the requisites of a competent medical expert. Rule 601(D) of the Ohio Rules of Civil Procedure (A. 18); Ohio Revised Code Section 2743.43 (A. 18). With this due process afforded petitioner in the medical malpractice suit, the petitioner has no basis for his claim that he has suffered a wrong without a legal remedy or that the State deprived him of due process of law.

This Court has held that property interests are not created by the Constitution. *Board of Regents v. Roth,* 408 U.S. 564 (1972). In *Roth* this Court held that property interests are:

> . . . created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. 408 U.S. at 577.

Ohio law has always required an arrest or seizure of property in order to state a claim for malicious prosecution. The petitioner failed to allege this essential element and he has no claim of entitlement to maintain the malicious prosecution case. Simply, he has not been deprived of any property interest protected by the Fourteenth Amendment.

Furthermore, the countervailing state interests in affording litigants the free, unfettered access to the courts is justification for maintaining the arrest or seizure of property elements for malicious prosecution. The Ohio courts have a legitimate concern about the potential "chilling effect" on litigants. This Court should not create a new cause of action for malicious prosecution in Ohio. This should be a matter for the Ohio courts or legislature.

III. A MALICIOUS PROSECUTION ACTION MAY NOT BE MAINTAINED BY A THIRD PERSON AGAINST AN ATTORNEY WHO PROSECUTED THE ALLEGED MALICIOUS LITIGATION ON BEHALF OF, AND WITH THE AUTHORITY OF, HIS CLIENTS.

Ohio law states that an attorney is immune from liability to third parties for claims based on malicious prosecution. *W.D.G., Inc. v. Mutual Manufacturing Supply Co.*, 5 Ohio Op. 3d 397 (Ohio App., Franklin Cty., 1976). Due to the unique trust and confidentiality which permeates the attorney-client relationship, and the legal profession itself, the courts cannot be permitted to become an arena for third party to second-guess or sanction an attorney's professional conduct. The Ohio Supreme Court has wisely left such matters to the exclusive jurisdiction of the Code of Professional Responsibility and the disciplinary proceedings contained therein. The legal pro-

fession polices itself—it sets its own standards of professional conduct. If an attorney's conduct is questioned then those standards are available to judge his conduct.

The legal profession operates on the presumption that an attorney will not act with malice and that there is a reasonable and good faith basis for lawsuits filed on behalf of a client. Whether or not the client acts with malice is irrelevant so long as the lawsuit has grounds in law and in fact. If a third party is injured by a malicious unfounded lawsuit then his remedy lies with the client not the attorney. The attorney must answer to his client if he files a lawsuit knowing there was no reasonable grounds in law and in fact—this is malpractice. There is no need to extend the scope of malicious prosecution to permit claims against attorneys.

The Complaint alleged that the medical malpractice action was filed by respondents Swansons "by and through their attorney, Shia Shapiro". There was no allegation that respondent Shapiro was acting in concert or conspiracy with the Swansons. Nor is there any allegation that respondent Shapiro was at any time acting other than as the Swansons' attorney.

Respondent Shapiro's first duty and loyalty was owed to his clients, the Swansons. Any duty owed to petitioner is contained within the Code of Professional Responsibility for which the petitioner does not need a cause of action in malicious prosecution to enforce. The obvious conflict of interest, and the potential "chilling effect" on an attorney's zealous representation of his clients, should attorneys be open to malicious prosecution claims must be avoided.

The petitioner has no right to file a malicious prosecution claim against respondent Shapiro and, thus, has not been deprived of due process of law or equal protection. Petitioner's remedy, if at all, lies with the Swansons not their attorney.

CONCLUSION

The petitioner failed to timely and properly raise the constitutional issues in the state courts. The petitioner's complaint was dismissed, and the dismissal affirmed, on the basis of state law. The petitioner has failed to invoke the jurisdiction of this Court and the Petition for a Writ of Certiorari must be dismissed.

The petitioner has not been deprived of due process of law or equal protection of the laws. The issues raised by petitioner are matters of state law. The petitioner's complaint was dismissed in accordance with state law. The respondents' constitutional rights would be violated by the retroactive application of any new cause of action for malicious prosecution. This Court does not have the power, as petitioner is requesting, to create a federal cause of action for malicious prosecution. The petitioner has been afforded his constitutional rights and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

C. REYNOLDS KELLER, *Counsel of Record*
DONALD H. SWITZER
WESTON, HURD, FALLON, PAISLEY & HOWLEY
2500 Terminal Tower
Cleveland, Ohio 44113
216/241-6602
Counsel for Respondent, Shia Shapiro

APPENDIX

OHIO RULES OF CIVIL PROCEDURE

Rule 12(B)

(B) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided, however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

OHIO RULES OF EVIDENCE

Rule 601(D)

Every person is competent to be a witness except:

* * * * *

A person giving expert testimony on the issue of liability in any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care or treatment of any person, unless the person testifying is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state, and unless such person devotes three-fourths of his professional time to the active clinical practice in his field of licensure, or to its instruction in an accredited university.

OHIO REVISED CODE SECTION 2743.43

(A) No person shall be deemed competent to give expert testimony on the liability issues in a medical claim, as defined in division (D)(3) of section 2305.11 of the Revised Code, unless:

(1) Such person is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state;

(2) Such person devotes three-fourths of his professional time to the active clinical practice of medicine or surgery, osteopathic medicine or surgery, or podiatric medicine and surgery, or to its instruction in an accredited university.

(B) Nothing in division (A) of this section shall be construed to limit the power of the trial court to adjudge the testimony of any expert witness incompetent on any other ground.

Office-Supreme Court, U.S.
FILED
JUL 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2016

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JAMES P. FRACKELTON,

Petitioner,

vs.

GUS SWANSON, VIRGINIA SWANSON,
SHIA SHAPIRO,

Respondents.

On Petition For a Writ of Certiorari to the
Ohio Supreme Court

RESPONDENTS, GUS SWANSON'S AND VIRGINIA SWANSON'S, BRIEF IN OPPOSITION

JAMES K. CLOWER, Counsel of Record
YULISH, TWOHIG & ASSOCIATES CO., L.P.A.
600 Rockefeller Building
614 West Superior Avenue
Cleveland, Ohio 44113
216/241-2258
Counsel for Respondents,
Gus and Virginia Swanson

QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court has jurisdiction, under 28 U.S.C.A. Section 1257(3), to review the dismissal of petitioner's complaint where petitioner did not properly assert in the state courts the unconstitutionality of the ground for dismissal.

II. Whether the requirement under Ohio common law that an individual bringing an action for malicious prosecution must allege as damages the arrest of his person or seizure of his property constitutes denial of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Supreme Court of Ohio are all those parties listed in the caption of the case in this Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW I

PARTIES TO THE PROCEEDINGS I

CONSTITUTIONAL PROVISION 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. This Court Does Not Have Jurisdiction Under 28 U.S.C.A. Section 1257(3) to Review The Dismissal of Petitioner's Complaint for the Petitioner Did Not Properly Assert in the State Courts the Federal Questions He Now Seeks to Raise 5

II. A Necessary Element of an Action for Malicious Prosecution is Arrest of the Person or Seizure of Property as a Result of Judicial Process. Such a Requirement Does Not Constitute a Denial of Due Process or Equal Protection 7

CONCLUSION 10

APPENDIX:

Ohio Rules of Civil Procedure Rule 12(B) 11

TABLE OF AUTHORITIES

Cases

Avco Delta Corp. v. Walker, 22 Ohio App. 2d 61 (Franklin Cty., 1969) 7

Board of Education v. Marting, 7 Ohio Misc. 64 (C.P. Madison Cty., 1966) 7

Chicago, Indianapolis and Louisville Railway Co. v. McGuire, 196 U.S. 128 (1905) 6

Cincinnati Daily Tribune Co. v. Bruck, 61 Ohio St. 489 (1900) 7

Dakters v. Shane, 64 Ohio App. 2d 196 (Lorain Cty., 1978), m.c.o (September 7, 1978) 7, 8

Delk v. Colonial Finance Co., 118 Ohio App. 451 (Hamilton Cty., 1963) 7

Fashnacht v. Frank, 90 U.S. (23 Wall.) 416 (1874) 5

Hill v. California, 401 U.S. 797 (1971) 5

Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952) 6

Perry v. Arsham, 101 Ohio App. 285 (Cuyahoga Cty., 1956) 7

Powell v. Brunswick County, 150 U.S. 433 (1893) 5

Skarbinski v. Henry H. Krause Co., 378 F. 2d 656, 14 Ohio Misc. 54 (6th Cir., 1967) 7

Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972) 6

State, ex rel. Babcock v. Perkins, 165 Ohio St. 185 (1956) 6

Street v. State of New York, 394 U.S. 576 (1969) 6

W.D.G., Inc. v. Mutual Manufacturing and Supply Co., 5 Ohio Ops. 3d 397 (Franklin Cty., 1969) 7

Constitutional Provisions

United States Constitution, Amendment XIV 1, 4, 5, 9, 10

Statutes

28 U.S.C.A. Section 1257(3) 4, 5

Rules

Ohio Rules of Civil Procedure, Rule 12(B) 11

NO. 80-2016

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JAMES P. FRACKELTON,

Petitioner,

vs.

GUS SWANSON, VIRGINIA SWANSON,
SHIA SHAPIRO,

Respondents.

On Petition For a Writ of Certiorari to the
Ohio Supreme Court

RESPONDENTS', GUS SWANSON'S AND VIRGINIA SWANSON'S, BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISION

United States Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This action comes before the Court for a review of the dismissal of a complaint for malicious prosecution and abuse of civil process filed by petitioner, James P. Frackelton, on December 7, 1978 in the Court of Common Pleas of Cuyahoga County, Ohio. The complaint alleges that respondents, Gus Swanson and Virginia Swanson, by and through their attorney, Shia Shapiro, had maliciously and without probable cause brought an action against the petitioner for breach of warranty and negligence.

The litigation of which petitioner complained arose out of a vasectomy performed by petitioner on Gus Swanson. After the vasectomy Virginia Swanson, the wife of Gus Swanson, had become pregnant and had delivered a child on February 28, 1974. On or about May 24, 1974 the Swansons filed a complaint against the petitioner for breach of warranty and negligence in the performance of the vasectomy. At the close of respondents' case, the court directed a verdict for petitioner.

In his complaint in this case, petitioner alleged, inter alia, that the pressure from respondents' lawsuit had mandated his resignation as Chairman of the Department of Family Practice at Fairview General Hospital; that the filing of respondents' lawsuit had caused petitioner a mental trauma requiring hospitalization; and that petitioner had been deprived of property through loss of business and increase malpractice insurance premiums. The complaint did not allege arrest of petitioner's person, seizure of his property, subjection to forcible entry and detainer or the issuance of a temporary restraining order or injunction against him or the improper or wrongful use of process by petitioners. These allegations are essential elements of the actions for malicious prosecution and abuse of civil process in Ohio.

Based on the absence of these allegations, respondents Swanson and respondent Shapiro each filed a Motion to Dismiss Petitioner's Complaint, pursuant to Rule 12(B)(6) of the Ohio Rules of Civil Procedure (A.1), for failure to state a claim upon which relief can be granted. Petitioner filed a Brief in Opposition to the motions. Petitioner advanced as arguments against the Swansons' Motion to Dismiss that the complaint adequately states a cause of action, that the Court should reject what is known as the "strict" or English rule and adopt a more liberal rule of malicious prosecution and that the facts alleged established a cause of action even under the "strict" rule. The petitioner says absolutely nothing about the due process or equal protection provisions of either the State of Ohio Constitution or the Fourteenth Amendment to the United States Constitution. (This Brief has been lodged with the Clerk of the Supreme Court.)

The trial court, without opinion, dismissed with prejudice the petitioner's complaint against respondents Swanson and respondent Shapiro.

Petitioner appealed the dismissal to the Court of Appeals for the Eighth Appellate District. Petitioner presented an argument virtually identical to that raised in the trial court and again made no federal or state due process and equal protection arguments. (This Brief has been lodged with the Clerk of the Supreme Court.) The Court of Appeals affirmed the decision of the trial court.

Petitioner appealed as of right to the Supreme Court of Ohio and moved that court for an order directing the Court of Appeals to certify its record. In his Memorandum in Support of Jurisdiction, petitioner raised for the first time the matters of due process and equal protection. The Ohio Supreme Court overruled the Motion to Certify and dismissed the appeal for lack of a substantial constitutional question.

SUMMARY OF ARGUMENT

This Court does not have jurisdiction, under 28 U.S.C.A. Section 1257(3) to review the dismissal of petitioner's complaint. The petitioner did not properly assert in the Court of Common Pleas and in the Court of Appeals that the dismissal was violative of the principles of due process and equal protection. Thus, these issues were not before the Ohio Supreme Court and that court properly did not consider these arguments. Having failed to present this federal question properly in the state courts, the petitioner has not properly invoked the jurisdiction of this Court and the Petition for Writ of Certiorari must be dismissed.

The action in Ohio for malicious prosecution is a common law cause of action that has evolved over a long period of time. It is improper for the petitioner to request that this Court change the elements of the cause of action for malicious prosecution in Ohio. This petitioner has not been treated unlike all those others in Ohio asserting a claim of malicious prosecution. Thus, he has not been denied equal protection of the laws. Further, there is no deprivation of due process of law in the decisions by the various courts that the petitioner must satisfy all of the requirements for a cause of action for malicious prosecution.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION UNDER 28 U.S.C.A. SECTION 1257(3) TO REVIEW THE DISMISSAL OF PETITIONER'S COMPLAINT FOR THE PETITIONER DID NOT PROPERLY ASSERT IN THE STATE COURTS THE FEDERAL QUESTIONS HE NOW SEEKS TO RAISE.

Petitioner may not invoke the jurisdiction of this Court unless he complies with the requirements of 28 U.S.C.A. Section 1257(3) which states:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The petitioner must necessarily raise the Federal question of the state court in order to invoke this Court's jurisdiction pursuant to 28 U.S.C.A. 1257(3). This Court considers only such questions as were raised in the lower court. Fachnacht v. Frank, 90 U.S. (23 Wall.) 416 (1874); Hill v. California, 401 U.S. 797 (1971). This long-standing principle was stated in Powell v. Brunswick County, 150 U.S. 433, 439 (1893), as follows:

> "As many times reiterated, it is essential to the maintenance of jurisdiction upon the ground of erroneous decision as to the validity of a state statute or a right under the Constitution of the United States, that it should appear from the record that the validity of such statute was drawn in question as repugnant to the Constitution and that the decision sustained its validity, or that the right was specifically set up or claimed and denied. ...A definite issue as to the validity of the statute or the procession of the right must be distinctly deducible from the record before the state court can be held to have disposed of such a Federal question by its decision."

See also Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972).

Further, it has been determined that where a state court has not decided the Federal question there is an assumption that the omission was due to lack of proper presentation in the state court. Sidney Street v. State of New York, 394 U.S. 576 (1969); Chicago, Indianapolis and Louisville Railway Co v. McGuire, 196 U.S. 128 (1905).

Not only were the Federal questions not properly presented to the Ohio Supreme Court but the petitioner has failed to demonstrate that the Ohio Supreme Court properly considered and ruled upon the Federal questions. Review of the petitioner's brief in both the trial court and the Court of Appeals demonstrates that there was no discussion whatsoever of due process and equal protection principles and that these issues were initially raised in the Ohio Supreme Court as one of a half dozen "propositions of law" before the Ohio Supreme Court.

The Ohio Supreme Court sets forth the law established in a given case in the syllabus of its opinion. Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952). Paragraph 3 of the syllabus in state, ex rel. Babcock v. Perkins, 165 Ohio St. 185 (1956) states:

> "3. Where an appeal on questions of law is taken to the Supreme Court from the Court of Appeals, which latter court had jurisdiction of the subject matter and the parties to the action, the Supreme Court will not consider or determine claimed errors which were not raised and preserved in the Court of Appeals."

Thus, failing to raise the Federal questions in the trial court or in the intermediate appellate court is a fatal error and the Federal questions thus were not before the Ohio Supreme Court. Consequently, the Petition for a Writ of Certiorari must be dismissed.

II. A NECESSARY ELEMENT OF AN ACTION FOR MALICIOUS PROSECUTION IS ARREST OF THE PERSON OR SEIZURE OF PROPERTY AS A RESULT OF JUDICIAL PROCESS SUCH A REQUIREMENT DOES NOT CONSTITUTE A DENIAL OF DUE PROCESS OR EQUAL PROTECTION.

In Ohio, to establish a claim for malicious prosecution, the plaintiff must allege arrest of his person or seizure of his property. The Ohio Supreme Court long ago announced this requirement:

> "As a general rule no suit will lie for the malicious prosecution of a civil action where there has been no arrest of a person or a seizure of property." Cincinnati Daily Tribune Co. v. Bruck, 61 Ohio St. 489, (1900)

Accord, Skarbinski v. Henry H. Krause, Co., 378 F. 2d 656, 14 Ohio Misc. 54 (6th Cir., 1967); Dakters v. Shane, 64 Ohio App. 2d 196 (Lorain Cty., 1978), m.c.o. (September 7, 1978); W.D.G., Inc. v. Mutual Manufacturing & Supply Co., 5 Ohio Ops. 3rd 397 (Ohio Apps., Franklin Cty., 1976); Avco Delta Corp. v. Walker, 22 Ohio Apps. 2d 61 (Franklin Cty., 1969); Delk v. Colonial Finance Co., 118 Ohio Apps. 451 (Hamilton Cty., 1963); Perry v. Arsham, 101 Ohio Apps. 285 (Cuyahoga Cty., 1956); Board of Education v. Harting, 7 Ohio Misc. 64 (C.P., Madison Cty., 1966).

The necessity for this element of the malicious prosecution action has been recently reviewed and confirmed by an Ohio Court of Appeals in a case brought by a doctor who was victorious in an original action brought against him by his patient. The doctor sued his former patient and her attorney for having filed an action against him for negligence in a surgical procedure. It was later established that he had nothing to do with the surgery and he was dismissed from the suit. The Court of Appeals state that even if the original action had been maliciously instituted there was a fatal deficiency in the doctor's claim because there was no seizure of property: "Here there was neither an arrest of Dakters nor a seizure of his property." Further, the court noted that the law of Ohio, be it strict or harsh, is still that to have a legitimate claim for malicious prosecution the plaintiff must have been arrested or had his property seized:

> "We recognized that the rule is not the majority rule, (See 52 Am. Jur. 2d, Malicious Prosecution §10) and it has been severly criticized. (See, Prosser, Torts 4th Ed. §120).
>
> Yet it is still the law of Ohio until such time as the Supreme Court overrules it. Thus, we follow it and affirm the judgment." Dakters v. Shane, 64 Ohio App. 2d 196, 412 N.E. 2d 399, 401 (Lorain Cty., 1978), m.c.o. (September 7, 1978).

The Court of Appeals held that the requirements for a malicious prosecution action were not satisfied and the summary judgment granted by the trial court was affirmed.

In the instant case the Court of Appeals enunciated the reasons for the arrest or seizure of property requirement:

> "While the Ohio rule represents a minority view, important policy considerations support its continued application. First, litigants should have ready access to courts without risking liability for unsuccessful suits. Second, were suits for malicious prosecution more easily used, disputes

> in litigation would tend to be perpetuated rather than be concluded. While other elements must be proved in an action for malicious prosecution, the availability of a remedy for purported malicious prosecution without the arrest of a person or seizure of his property would loom as an uncertain threat against plaintiffs, discouraging their pursuit of bona fide claims."

Petitioner argues that a denial of equal protection arises because of the differences in the elements essential to a malicious prosecution action in Ohio and in other states. But, there is no claim that the petitioner has been treated in a fashion different from other plaintiffs in Ohio who advance a malicious prosecution claim. Because the petitioner is not placed in a "suspect class" and has been treated as have all other malicious prosecution plaintiffs in Ohio he has not been denied equal protection.

As for the denial of due process, which the petitioner alleges arises from lack of access to the state courts, this argument cannot stand. The petitioner had access to the court but did not have a cause of action. It is not a denial of due process for our Ohio courts to dismiss a cause of action because of the absence of an essential element. The trial court and appellate courts applied Ohio law, adopted in 1900 in the form of the "strict" arrest or seizure of property rule. In short, petitioner has no property interest of which he has been deprived. Nothing has been taken from him. Simply put, the events he complains of do not give rise to a cause of action for malicious prosecution in Ohio. And, it is submitted, it is not for this Court to creat a new form of action for malicious prosecution in Ohio. Ohio courts and the Ohio legislature are the appropriate forums for review. The Supreme Court of Ohio had an opportunity to review existing Ohio law and on February 26, 1981 it chose not to do so and dismissed the petitioner's appeal.

This Court should not accept this case after the Supreme Court of Ohio chose not to undertake a review of the elements required for the cause of action alleged and should dismiss the Petition for a Writ of Certiorari.

CONCLUSION

The petitioner did not properly assert in the Court of Common Pleas and in the Court of Appeals that the dismissal of his complaint was violative of the principles of due process and equal protection. These issues were first raised before the Supreme Court of Ohio and that court properly did not consider these arguments. For this reason this Court does not have jurisdiction and the Petition for a Writ of Certiorari must be dismissed.

The petitioner cannot call upon this Court to change the elements of the cause of action for malicious prosecution in Ohio. To require that this petitioner be able to assert the elements essential for his claimed cause of action neither denies him equal protection of the laws nor deprives him of due process of law. This petitioner has been deprived of no constitutional rights and, having failed to properly invoke the jurisdiction of this Court, the Petition for a Writ of Certiorari should be dismissed.

Respectfully submitted,

JAMES K. CLOWER, Counsel of Record
YULISH, TWOHIG & ASSOCIATES CO., L.P.A.
600 Rockefeller Building
614 West Superior Avenue
Cleveland, Ohio 44113
216/241-2258
Counsel for Respondents,
Gus Swanson and Virginia Swanson

APPENDIX

OHIO RULES OF CIVIL PROCEDURE

Rule 12(B)

(B) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided, however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

Office-Supreme Court, U.S.
FILED
SEP 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2016

In the Supreme Court of the United States

October Term, 1980

JAMES P. FRACKELTON,
Petitioner,

vs.

GUS SWANSON, VIRGINIA SWANSON,
SHIA SHAPIRO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

PETITIONER'S REPLY BRIEF

DONALD M. ROBINER, *Counsel of Record*
PAUL F. LEVIN
SCHWARZWALD, ROBINER, WOLF & ROCK,
A Legal Professional Association
616 Bond Court
1300 East Ninth Street
Cleveland, Ohio 44114
216/566-1600
Counsel for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

ARGUMENT 1

The Constitutional Claims Presented Were Sufficiently Raised In The State Courts, And Decided There 2

CONCLUSION 4

TABLE OF AUTHORITIES

Cases

Braniff Airways v. Nebraska State Board, 347 U.S. 590 (1954) 2

Charleston Federal Savings v. Alderson, 324 U.S. 182 (1945) 3, 4

Crowell v. Randell, 35 U.S. 365 (1836) 2

Konigsberg v. State Bar of California, 353 U.S. 252 (1956) 4

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1978) 2

Raley v. Ohio, 360 U.S. 423 (1959) 4

Saltonstall v. Saltonstall, 276 U.S. 260 (1928) 3

Street v. New York, 394 U.S. 576 (1969) 3

Thompson v. City of Louisville, 362 U.S. 199 (1960) 4

Vachon v. New Hampshire, 414 U.S. 478 (1974), *reh. den.*, 415 U.S. 952 4

No. 80-2016

In the Supreme Court of the United States

October Term, 1980

JAMES P. FRACKELTON,
Petitioner,

vs.

GUS SWANSON, VIRGINIA SWANSON,
SHIA SHAPIRO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
OHIO SUPREME COURT

PETITIONER'S REPLY BRIEF

ARGUMENT

Respondents contend that petitioner improperly invokes the jurisdiction of this Court by having failed to sufficiently and properly raise the federal question in the state courts. Petitioner submits this reply brief in support of his petition and in response to Respondents' allegations.

THE CONSTITUTIONAL CLAIMS PRESENTED WERE SUFFICIENTLY RAISED IN THE STATE COURTS, AND DECIDED THERE.

Review of the briefs filed by petitioner in both the trial court and the Ohio Court of Appeals reveals that petitioner asserted that the practice of medicine is a protected property right under the Constitutions of the United States and Ohio; and that interference with this property right constitutes an unconstitutional deprivation of property. (Page 11, Brief in Opposition to Motions to Dismiss; and pages 19 and 20, Assignments of Error and Brief filed in the Court of Appeals of Ohio, Eighth Appellate District, copies of which briefs have been lodged with the Clerk of the Supreme Court by respondents). Respondents concede that the constitutional issues were clearly raised in the memorandum in support of jurisdiction filed by petitioner in the Supreme Court of Ohio.

While respondents may question the precision with which the constitutional issues were raised, it cannot be denied that such issues were raised. This Court has stated that in order to preserve a constitutional issue for review, a party need not state the issue *in totidem verbis*, so long as the issue is raised by a necessary inference from the facts. *Crowell v. Randell*, 35 U.S. 365 (1836). Nor need the specific federal right or constitutional provision be set out in order to give this Court jurisdiction to review a state court decision. If the record demonstrates that a federal question has been brought to the attention of a state court either expressly or by clear intendment, jurisdiction is preserved. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1978). See also, *Braniff Airways v. Nebraska State Board*, 347 U.S. 590 (1954).

Furthermore, even if there was some colorable lack of precision in framing the constitutional question before the courts below, the question was clearly placed before the Ohio Supreme Court, and that Court ruled on the issue. Reference to the Ohio Supreme Court's order dismissing the appeal (Appendix A-2, to the petition for writ of certiorari), reveals that the Supreme Court of Ohio *sua sponte* dismissed petitioner's appeal "for the reason that no substantial constitutional question exists herein". In order to reach such a conclusion, the Ohio Supreme Court must necessarily have considered the constitutional issue. The only constitutional issue which was presented before the Ohio Supreme Court is the precise constitutional issue presented here, *i.e.* that dismissal of the malicious prosecution action violated petitioner's due process and equal protection rights guaranteed by the United States Constitution. The Ohio Supreme Court could have considered and dismissed no other constitutional question, for no other constitutional question was raised. It is well established that even in face of a deficiency in the particularity with which a federal issue was framed below, that deficiency is cured if the highest state court assumed that the federal question was properly before it and expressly considered and decided same. Thereafter, this Court will not inquire into the framing of the issue below. *Saltonstall v. Saltonstall*, 276 U.S. 260 (1928); *Charleston Federal Savings v. Alderson*, 324 U.S. 182 (1945). Moreover, a state court's refusal or failure to articulate its denial of a federal claim is just as reviewable as an express decision. The question of whether the issue was raised properly is itself a federal question, as to which this Court is not bound by the state court decision. *Street v. New York*, 394 U.S. 576 (1969). After a state supreme court has decided a constitutional issue, any inquiry as to how or when the issue was raised is considered

irrelevant by this Court, and an irrebuttable presumption exists that the issue was properly raised below. *Charleston Federal Savings v. Alderson, supra.* This is true even if the issue was raised in the assignments of error only. The lower court is still deemed to have considered the question. *Konigsberg v. State Bar of California,* 353 U.S. 252 (1956).

Finally, even in the absence of a showing that a constitutional issue was raised at the earliest possible time, this Court has never precluded itself from considering such constitutional issues. This Court has exercised review with respect to plain errors of constitutional proportions not raised below. *Vachon v. New Hampshire,* 414 U.S. 478 (1974), *reh. den.,* 415 U.S. 952; *Thompson v. City of Louisville,* 362 U.S. 199 (1960). If various rights, privileges and immunities are claimed, certiorari has been granted to determine issues of great public importance. *Raley v. Ohio,* 360 U.S. 423 (1959).

CONCLUSION

For the reasons advanced in the petition for writ of certiorari, and in this reply brief, the petition for writ of certiorari should be granted.

Respectfully submitted,

SCHWARZWALD, ROBINER, WOLF & ROCK,
A Legal Professional Association
DONALD M. ROBINER, *Counsel of Record*
PAUL F. LEVIN
616 Bond Court
1300 East Ninth Street
Cleveland, Ohio 44114
216/566-1600
Attorneys for Petitioner